



1 CRAIG BIERKO  
2 489 Hudson Street  
3 New York, NY 10014  
4 646.808.5127

5 DEFENDANT IN PRO PER

7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9

10  
11  
12 HANK AZARIA, an individual, and  
13 HOW TO PICTURES, INC., a  
14 California corporation,

15 Plaintiff,

16 vs.

17 CRAIG BIERKO, an individual,

18 Defendant.  
19

Case No.: 12-cv-09732-GAF-RZ

NOTICE OF MOTION AND  
MOTION TO SET ASIDE ENTRY  
OF DEFAULT PURSUANT TO  
FED. R. CIV. P. 55(c) AND  
OPPOSITION TO APPLICATION  
FOR DEFAULT JUDGEMENT BY  
COURT

Hearing Date: Feb. 11, 2013

Time: 9:30 a.m.

Judge: Gary A. Feess

Courtroom: 740

20  
21  
22 **TO THE HONORABLE COURT AND TO ALL PARTIES:**

23 PLEASE TAKE NOTICE that on February 11, 2013 at 9:30 a.m., or as soon  
24 thereafter as this matter may be heard in the above-entitled Court located at 255 East  
25 Temple Street, Los Angeles, CA 90012-3332, Craig Bierko, the Defendant in this case,  
26  
27  
28

- 1 -

NOTICE OF MOTION AND MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO FED. R. CIV. P.  
55(c)

1 will move this Court to set aside entry of default for good cause, pursuant to Rule 55(c)  
2 of the Federal Rules of Civil Procedure.

3  
4 This motion is based upon the attached Memorandum of Points and Authorities,  
5 Declaration in Support, the complete files and records in this action, and upon such  
6 oral and documentary evidence as may be allowed at the hearing of this motion.  
7

8 This motion is made following the conference of counsel pursuant to L.R.  
9 7-3 which took place on December 21st 2012 when I attempted to call opposing  
10 counsel, followed by email, to request they set aside the motion for default which was  
11 nevertheless filed by Plaintiff's counsel on December 26th.  
12

13  
14 DATED: January 29, 2013

By: 

CRAIG BIERKO  
Defendant in Pro Per

1 CRAIG BIERKO  
2 489 Hudson Street  
3 New York, NY  
4 646.808.5172

5 DEFENDANT IN PRO PER

6  
7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9

10 HANK AZARIA, an individual, and  
11 HOW TO PICTURES, INC., a  
12 California corporation,

13 Plaintiff,

14 vs.

15 CRAIG BIERKO, an individual,  
16 Defendant.  
17

Case No.: 12-cv-09732-GAF-RZ

18 **MEMORANDUM OF POINTS AND**  
19 **AUTHORITIES IN SUPPORT OF**  
20 **MOTION TO SET ASIDE ENTRY**  
21 **OF DEFAULT PURSUANT TO**  
22 **FED. R. CIV. P. 55(c) AND**  
23 **OPPOSITION TO APPLICATION**  
24 **FOR DEFAULT JUDGEMENT BY**  
25 **COURT**

**Hearing Date:** Feb. 11, 2013

**Time:** 9:30 a.m.

**Judge:** Gary A. Feess

**Courtroom:** 740

26 Defendant respectfully submits this Memorandum of Points and Authorities in

27 Support of Defendant's Motion to Set Aside Entry of Default.

28 //

//

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- 1 -

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF  
DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)

1 //

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- 2 -

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF  
DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)

**TABLE OF CONTENTS**

I. INTRODUCTION .....	1
II. STATEMENT OF FACTS AND PROCEDURAL HISTORY .....	1
III. ARGUMENT .....	3
A. Defendant's Delay in Responding to the Lawsuit was Not Culpable. ....	4
B. Defendant Has a Meritorious Defense to the Lawsuit. ....	6
C. Plaintiff Will Not Suffer Prejudice If Entry of Default Is Set Aside.....	7
IV. CONCLUSION .....	8

**TABLE OF AUTHORITIES**

**Cases**

<i>Audio Toys, Inc. v. Smart AV Pty Ltd.</i> , 2007 U.S. Dist. LEXIS 44078 (N.D. Cal. June 6, 2007) .....	6, 7
<i>Bateman v. United States Postal Service</i> , 231 F.3d 1220 (9th Cir. 2000) .....	7
<i>Bonita Packing Co. v. O'Sullivan</i> , 165 F.R.D. 610 (C.D. Cal. 1995).....	4
<i>Franchise Holding II, LLC v. Huntington Rests. Group, Inc.</i> , 375 F.3d 922 (9th Cir. 2004) .....	3, 4
<i>Hawaii Carpenters' Trust Funds v. Stone</i> , 794 F.2d 508 (9th Cir. 1986). ....	6
<i>Meadows v. Dominican Republic</i> , 817 F.2d 517 (9th Cir. 1987) .....	4
<i>TCI Group Life Ins. Plan v. Knoebber</i> , 244 F.3d 691 (9th Cir. 2001).....	4, 7

**Statutes**

Fed. R. Civ. P. 55(c).....	1, 3, 4, 8
Fed. R. Civ. P. 60(b)(1) .....	3, 4

1  
2 **I. INTRODUCTION**

3       The Court should set aside entry of default against Defendant pursuant to Fed.  
4  
5 R. Civ. P. 55(c) because there is good cause for Defendant's delay in appearing in this  
6  
7 action. Defendant Craig Bierko appears pro se on behalf of himself only.

8 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

9  
10       Plaintiff filed a lawsuit against Defendant on November 14, 2012. According to  
11 the Proof of Service on file with this Court, Defendant was served on November 21,  
12 2012. The Court entered default against Defendant on December 20, 2012.

13  
14 Defendant became aware of the lawsuit on: November 14, 2012. (Decl. of Defendant ¶

15  
16 3.) Defendant found out about the lawsuit because [ \_ Served at residence in New York  
17 City

18  
19 \_\_\_\_\_ ]. (Decl. of Defendant ¶ 3.)

20  
21 Defendant took the following actions in response to the lawsuit :

22 Through my transactional entertainment lawyer I engaged in extensive good faith  
23 negotiations to settle.  
24

25 As the deadline to respond approached Plaintiff's council removed a key provision  
26 without my knowledge and without any explanation.  
27  
28

- 5 -

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF  
DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)

1 On the return date, December 17, 2012, Plaintiff refused my request for an extension to  
2 in order to obtain litigation council in order to I answer or move.

3  
4 Acting Pro Se, I attempted to move for an extension by calling and writing the court  
5 and informing the Plaintiff's council.

6  
7 (Decl. of Defendant ¶ 4.)

8  
9 Defendant did not file a response to the lawsuit with the Court on time for the  
10 following reasons:

11 Settlement negotiations had been ongoing and continued up to the deadline, at which  
12 time I discovered that several key terms had been removed from the final draft release  
13 without my knowledge and without any explanation.

14  
15 Until this point I had no reason to engage litigation council and, on or about December  
16 17, 2012, I asked the plaintiff for an extension of at least thirty days in order to move  
17 but the plaintiff refused.

18  
19 Acting Pro Se I called the court myself to move for an extension, which I followed  
20 with an E-mail to both the court and the plaintiff's attorneys, believing the motion to  
21 extend was now in process.

22  
23 Despite being aware that I had asked the court for an extension to answer or move the  
24 plaintiff nevertheless requested default judgement on December 19, 2012.

25  
26  
27 (Decl. of Defendant ¶ 5.)



1 The following facts support Defendant's defenses to this lawsuit:

2  
3 1) I reside in New York City where the plaintiff owns a second home, the District of  
4 California is not convenient and travel is prohibitively expensive.

5  
6 2) At this point I do not know if the plaintiff has obtained copyright registration for the  
7 property in question.

8  
9  
10 3) Under California "pitch" rules, the plaintiff agreed never to exploit the property in  
11 question without my consent.

12  
13 4) I dispute most of the plaintiff's factual allegations.

14 (Decl. of Defendant ¶ 6.)

15  
16 **III. ARGUMENT**

17  
18 Federal Rule of Civil Procedure 55(c) provides that an entry of default may be  
19 set aside upon a showing of good cause. Fed. R. Civ. P. 55(c). The Ninth Circuit's  
20 good cause standard for setting aside entry of default is the same as that for setting  
21 aside default judgment under Rule 60(b), but the test for setting aside entry of default  
22 is less rigid and is more generous to the party in default. *Franchise Holding II, LLC v.*  
23 *Huntington Rests. Group, Inc.*, 375 F.3d 922, 925 (9th Cir. 2004).

1       The Court considers three factors when deciding whether to set aside default: (1)  
 2       whether the defendant's culpable conduct led to the default; (2) whether the defendant  
 3       has a meritorious defense; and (3) whether setting aside default would prejudice the  
 4       plaintiff. *Id.* at 925-26. In addition, "[t]he law does not favor defaults," and "therefore,  
 5       any doubts as to whether a party is in default should be decided in favor of the  
 6       defaulting party." *Bonita Packing Co. v. O'Sullivan*, 165 F.R.D. 610, 614 (C.D. Cal.  
 7       1995).

13       **A. Defendant's Delay in Responding to the Lawsuit was Not Culpable.**

14       In the Ninth Circuit, analysis of "culpability" for the purposes of demonstrating  
 15       "good cause" under Rule 55(c) overlaps with the standard for "excusable neglect" under  
 16       Rule 60(b)(1). *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir.  
 17       2001) (questioned on other grounds); *also see Meadows v. Dominican Republic*, 817  
 18       F.2d 517, 522 (9th Cir. 1987) (finding that the conduct of defendants in district court  
 19       was culpable because defendants were aware of federal law, and their intentional  
 20       failure to respond to the action was not excusable neglect). The Ninth Circuit finds a  
 21       negligent failure to respond excusable if the defaulting party offers a credible, good-  
 22       faith explanation for the delay that negates "any intention to take advantage of the  
 23

1 opposing party, interfere with judicial decision-making, or otherwise manipulate the  
2 legal process." *Knoebber*, 244 F.3d at 697-98. Further, in analyzing culpability, the  
3  
4 Court may consider a defendant's exigent personal matters, his mental state, and his  
5  
6 lack of familiarity with legal matters. *See id.* at 699 (finding defendant's delay in  
7  
8 response not culpable because she was grieving the death of her husband and was not  
9  
10 familiar with the legal system).

11  
12 While Defendant did not file a response with the Court in time, Defendant's  
13  
14 conduct was excusable because

15 1) Negotiations on a draft settlement were ongoing up until the last day.

16 2) For two thirds of the twenty one day period I was working eighteen hour days  
17  
18 as a guest actor on a television show during which I communicated with my attorney  
19  
20 between shots, during my commute, meals and preparation for the following day.  
21

22 3) Thanksgiving and Christmas holidays made it impossible for me to  
23  
24 communicate with my contractual attorney or seek litigation council.  
25

26 4) Believing progress had been made, I read the final settlement draft (dated on  
27  
28 or around December 14th, 2012) and discovered that opposing council had removed

1 key provisions without my knowledge and demanded I sign or risk a default judgement  
2 and enormous court fees.  
3  
4

5 5) I was unaware of my right to act Pro Se and request time from the court  
6 directly and that, despite opposing council's preference, the court does not expect me  
7 to forfeit my right to defend my property. I believed I had to choose between a release  
8 that had been changed without my knowledge or risk the remainder of my savings to  
9 pay court fees and the terms of a default judgement against me. At this point a friend  
10 explained my right to call the court Pro Se and request more time time. After making  
11 the call, following it with an E-mailed request and notifying opposing council I  
12 believed the motion was proceeding and would be granted.  
13  
14  
15  
16  
17  
18

19 Defendant had no intent to gain an advantage over the opposing party or to delay  
20 legal proceedings. As Defendant's delay in response was due to excusable neglect, the  
21 Court should find that Defendant's conduct was not culpable.  
22  
23  
24

25 **B. Defendant Has a Meritorious Defense to the Lawsuit.**

26 A defense is considered meritorious if "there is some possibility that the  
27 outcome of the suit after a full trial will be contrary to the result achieved by the  
28

- 10 -

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF  
DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)

1 default." *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986).

2  
3 All that is required is an assertion of "a factual or legal basis that is sufficient to raise a

4  
5 particular defense; the question of whether a particular factual allegation is true is

6  
7 resolved at a later stage." *Audio Toys, Inc. v. Smart AV Pty Ltd.*, 2007 U.S. Dist.

8  
9 LEXIS 44078, \*8 (N.D. Cal. June 6, 2007).

10 Defendant has the following defenses to this lawsuit:

11 (*Explain your responses to the lawsuit and include supporting facts.*)

12  
13 \_\_\_\_\_ Meritorious Defense to Lawsuit

14 1) I live in NYC as does plaintiff. Central District of California adds a number of  
15 prohibitive expenses and unnecessary inconveniences, including travel,  
16 accommodations to find representation.

17  
18 2) I dispute plaintiff's factual allegations.

19  
20 3) I am unaware whether or not the plaintiff has registered the copyrights of the  
21 property in question.

22  
23 4) Plaintiff breached an agreement with me not to use the property in question.

24 5) others to be determined after engaging council.

1 If Defendant prevails on these defenses, the outcome would be contrary to the  
 2 result achieved by default. Therefore, Defendant has set forth a meritorious defense  
 3 and satisfies the second good cause factor.  
 4

5 **C. Plaintiff Will Not Suffer Prejudice If Entry of Default Is Set Aside.**

6 Prejudice is determined by whether a party will be hindered in pursuing its  
 7 claim. *See Knoebber*, 244 F.3d at 701. The fact that a party may be denied a quick  
 8 victory is not sufficient to deny relief from default judgment. *Bateman v. United States*  
 9 *Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000). "The delay must result in tangible  
 10 harm such as loss of evidence, increased difficulties of discovery, or greater  
 11 opportunity for fraud or collusion." *Audio Toys*, 2007 U.S. Dist. LEXIS at \*9.  
 12  
 13  
 14  
 15

16 Allowing the case to move forward on the merits after only a short delay should  
 17 not prejudice Plaintiff's ability to litigate its case. The only prejudice that might result  
 18 to Plaintiff by a denial of default judgment is that Plaintiff will not be able to ensure an  
 19 easy victory. As no prejudice will result to Plaintiff in reopening this case, the third  
 20 and final good cause factor is satisfied.  
 21  
 22  
 23

24 Defendant is ready and willing to litigate this lawsuit. Defendant's delay in  
 25 responding was not culpable, Defendant has meritorious defenses, and Plaintiff will  
 26 not suffer any prejudice in pursuing its claims if default is set aside. Therefore,  
 27  
 28

1 Defendant has met the good cause standard of Rule 55(c) and this Court should set  
2 aside the entry of default against him.

3  
4 **IV. CONCLUSION**

5 Based on the above reasons, this Court should grant Defendant's motion.

6  
7  
8 DATED: January 29, 2013

By: 

CRAIG BIERKO  
Defendant in Pro Per

1 CRAIG BIERKO  
2 489 Hudson Street  
3 New York, NY 10014  
4 646.808.5127

5 DEFENDANT IN PRO PER

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

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11 HANK AZARIA, an individual, and  
12 HOW TO PICTURES, INC., a  
13 California corporation,

14 Plaintiff,

15 vs.

16 CRAIG BIERKO, an individual,

17 Defendant.

Case No.: 12-cv-09732-GAF-RZ

18 **DEFENDANT'S DECLARATION IN**  
19 **SUPPORT OF MOTION TO SET**  
20 **ASIDE ENTRY OF DEFAULT**  
21 **PURSUANT TO FED. R. CIV. P.**  
22 **55(c) AND OPPOSITION TO**  
23 **DEFAULT JUDGEMENT BY**  
24 **COURT**

25 **Hearing Date:** Feb. \_\_, 2013

26 **Time:** 9:30 a.m.

27 **Judge:** Gary A. Feess

28 **Courtroom:** 740

21  
22 I, CRAIG BIERKO, declare as follows:

23 1. I am the Defendant in the above-entitled case.

24 2. I have personal knowledge of the following facts, and, if called as a witness, I  
25 could and would competently testify thereto.

26 - 1 -

27 DEFENDANT'S DECLARATION IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT  
28 TO FED. R. CIV. P. 55(c)



1  
2  
3  
4 3. I became aware of this lawsuit on November 14, 2012 . I found out about this  
5 lawsuit because: I was served at home in New York City.  
6

7 4. I responded to the lawsuit by taking the following actions:  
8

9 Through my transactional entertainment lawyer I continued to engage in  
10 extensive good faith negotiations to settle.  
11

12 As the day to answer approached Plaintiff's council removed key provisions  
13 without my knowledge or any explanation.  
14

15 On the answer date, December 17, 2012, Plaintiff refused my request for an  
16 extension to obtain litigation council in order to answer or move.  
17

18 Having no other choice, I acted Pro Se and attempted to move for an extension  
19 by calling and writing the court and informing the Plaintiff's council.  
20  
21  
22  
23  
24

25 5. My delay in filing a response to the lawsuit was not intentional. I did not file  
26 timely formal response to the lawsuit for the following reasons:  
27  
28

- 2 -

DEFENDANT'S DECLARATION IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT  
TO FED. R. CIV. P. 55(c)

1           Shortly after being served at my home in New York City on November 21st,  
2           2012 I was hired for two weeks of work on a television episode in Los Angeles.

3  
4           Working eighteen hour days (not including preparation for the following day) I  
5           remained certain that fair settlement terms could be negotiated, communicating with  
6           my attorney via E-mail and phone messages between shots, while eating meals and  
7           during my commute.

8  
9  
10           More than two thirds of my time to return an answer was spent balancing the  
11           demands of a professional commitment with the Plaintiff's sudden reticence to  
12           negotiate any of my required terms.

13  
14           Feeling coerced to sign a settlement agreement lacking any of my required  
15           terms, opposing council intimated that failure to sign the release would be met with a  
16           motion for default judgement and potentially enormous financial loss.

17  
18           As the answer date approached, Plaintiff's attorney sent me a "final draft" of the  
19           release, insisting it be signed and returned immediately. After noticing that key terms  
20           had been removed I was given no explanation and assured there would be no further  
21           negotiation, these were the terms. Take it or leave it.

22  
23  
24           Confused by the covert nature of Plaintiff's last minute change to the release, my  
25           attorney's suggestion to sign (despite the removal of terms he had approved and added  
26           on my behalf) and how to respond to these unmentioned, unchallenged changes in light

27  
28           - 3 -

DEFENDANT'S DECLARATION IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT  
TO FED. R. CIV. P. 55(c)

1 of opposing council's threat to move for a default judgement against my wishes,  
2 possibly at the expense of my future security.  
3

4 I felt coerced by opposing council to choose between a release that no longer  
5 included any of my required terms and the possibility of financial ruin.  
6

7 Despite having less than a month to answer a lawsuit I consider to be baseless, I  
8 have done my utmost to negotiate terms that would allow me to move on from this  
9 unfortunate experience.  
10

11 After feeling coerced to sign a covertly changed release, my requests for a  
12 modest extension to find representation that could help me understand my legal rights  
13 and consider my alternatives in light of these sudden changes have been refused.  
14

15  
16 As the date to answer fell on a day when many people travel for the Holidays a  
17 substantive exchange between myself and my attorney was not possible.  
18

19 Without understanding the ramifications of the Plaintiff's last-minute changes -  
20 and believing I had to choose between signing an unacceptable release or almost  
21 certain financial ruin - a friend explained, just hours before what I believed to be my  
22 deadline, that the court doesn't want me to forfeit my property without first hearing my  
23 argument - that, despite opposing council's coercion and intimations, I have the right  
24 to act Pro Se and move for an extension on my own behalf.  
25  
26  
27  
28

- 4 -

DEFENDANT'S DECLARATION IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT  
TO FED. R. CIV. P. 55(c)

1 Following procedure at the same time I was learning it, I followed a phone  
2 message to the officer of the court with an E-mailed request of my desire to move for  
3 an extension, which I also sent to opposing council.  
4

5 Within a few days the officer of the court called to tell me that the judge for the  
6 case had been transferred and that I now needed to call the Pro Se clinic in order to  
7 move for an extension.  
8

9 When the woman with whom I spoke pulled up the court docket she informed  
10 me that, despite notification of my attempt to move, opposing council had filed a  
11 motion for default within the hour without notifying either myself or my attorney.  
12  
13

14 6. The following facts support my defenses to this lawsuit: Following facts  
15 support my defense to this lawsuit:  
16

17 1) I live in New York City  
18

19 2) I dispute Plaintiff's factual allegations.  
20

21 3) I created the property in question during college, introduced it to the Plaintiff  
22 in or around 1990. After Plaintiff asked for and was denied permission to develop my  
23 property as a screenplay vehicle featuring himself, Plaintiff agreed not to further  
24 develop the property without my permission.  
25

26 Plaintiff has broken our agreement and acted contrary to California "pitch" rules.  
27 I have witnesses who can attest to this.  
28

- 5 -

DEFENDANT'S DECLARATION IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT  
TO FED. R. CIV. P. 55(c)

1 7. I have no reason to believe Plaintiff will suffer prejudice if the Court grants  
2 this motion.  
3

4 8. For nearly two years I have sought a resolution which I believe is possible - in  
5 fact, the day after receiving my notice to move for an extension Pro Se opposing  
6 council offered to add a few of the terms I require back into the release.  
7

8 Plaintiff's council is trying to leverage the county's rules against me rather than  
9 act in good faith toward a fair resolution.  
10  
11

12  
13  
14 I declare under penalty of perjury that the foregoing is true and correct.  
15

16 Executed on January 29, 2013, in New York, New York.  
17

18 Sign:   
19

20 Print Name: CRAIG BIERKO  
21 Defendant in Pro Per  
22  
23  
24  
25  
26  
27  
28